

8-3100-9469-2

8-3100-9474-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Gerald E. Jacobs and Siegfried Stier,
Petitioners, v. Crow Wing County,
Respondent

FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION

This matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on March 27, 1995 in the Social Services Building of the Crow Wing County Courthouse in Brainerd, Minnesota and was completed on March 30, 1995. The hearing was held pursuant to Notices of Petitions and Orders for Hearing issued by the Commissioner of the Minnesota Department of Veterans Affairs on February 16 and 17, 1995. At the parties' request, the two petitions were consolidated for hearing. The record closed on June 8, 1995, when the parties' briefs had been filed and the parties' arguments concerning statements in those briefs were resolved.

Gregg M. Corwin, Gregg M. Corwin & Associates, Attorneys at Law, 508 East Parkdale Plaza Building, 1660 South Highway 100, St. Louis Park, Minnesota 55416-1534, appeared on behalf of the Petitioners. Thomas A. Fitzpatrick, Attorney at Law, 220 Laurel Street, P.O. Box 367, Brainerd, Minnesota 56401, appeared on behalf of the Respondent.

NOTICE

This Report is a recommendation not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after reviewing the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. § 14.61, the Commissioner's final decision shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Gerald Bender, Veterans Preference Office, Minnesota Department of Veterans Affairs, 20 West 12th Street, St. Paul, Minnesota 55155-2079, (612) 397-5828, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUE

The issues in this case are as follows:

1. Whether either Petitioner was a department head or held a strictly confidential relation to the Respondent thereby disqualifying him from any hearing rights under Minn. Stat. § 197.46 (1994) when his position was abolished.
2. Whether the Respondent abolished the Petitioners' positions in good faith, and
3. Whether the Petitioners are entitled to any relief under Minn. Stat. § 197.481, subd. 1 (1994) as a result of the Respondent's decision to eliminate their positions and remove them from employment.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Siegfried Stier is an honorably discharged veteran of the United States Army. He was in active duty from March 11, 1964 to March 10, 1966. Ex. 11. Stier has an associate's degree in business administration and has worked in the personnel field for the last 26 years.

2. In 1989, Stier applied for work as the personnel coordinator for Crow Wing County (County). He was subsequently interviewed and hired by the Crow Wing County Board of Commissioners (Board). He began full-time employment as the personnel coordinator on July 3, 1989 at a monthly salary set by the Board.

3. Stier's position as personnel coordinator was newly created by the Board in 1989. Before Stier was hired, personnel matters were handled by the Board, or one of its committees, the County's department heads and the local job services office.

4. As the personnel coordinator, Stier was responsible for administering the County's human resources program, participating in the negotiation of labor agreements, developing personnel policies, and administering personnel programs. Ex.

1. His primary job tasks were as follows:

1. Plans, recommends and implements personnel policies and procedures. Authors employee personnel policy manual and revises as appropriate.
2. Negotiates labor agreements. Answers questions pertaining to the agreements and makes a determination regarding issues that are not clearly stated.
3. Develops and administers Countywide compensation and classification program for County employees.
4. Develops and administers a Countywide Affirmative Action program in accordance with applicable State and

Federal laws. Resolves Equal Employment concerns/grievances.

5. Develops and administers a Countywide training program for County employees. Analyzes employee development needs and implements program to address them.
6. Develops and administers staffing and selection policies and procedures. Reviews and monitors the hiring process to ensure applicable policies are followed and meet legal requirements.
7. Provides direction and oversees the administration of health and other employee benefit programs coordinated by the Risk Manager.
8. Interviews, recommends the hiring, assigns work, trains, evaluates and disciplines departmental staff.
9. Responds to daily personnel issues and concerns; researches special legal issues and recommends an appropriate course of action. Collaborates with the Board of Commissioners as appropriate.
10. Determines program and operational financial needs; prepares a preliminary budget and recommends priorities to the County Board for approval. Monitors budget on an ongoing basis.
11. Performs other related duties of comparable level/type as required.

Id. Performance of these duties required specialized, professional training and ongoing seminars, workshops, and continuing education.

5. The Board served as Stier's immediate supervisor. Stier had a regularly scheduled time slot on the Board's weekly agenda. During these meetings, Stier consulted with the Board on hiring and other personnel policies and procedures. The Board made final decisions on all personnel matters. Stier could only act in accordance with Board directives; he had little discretion and no power to implement personnel policies and procedures without Board approval. Generally speaking, Stier felt that he had too little discretion due to "micro-management" by the Board. Ex. 2.

6. When the Board authorized a new position or filling a vacant one, Stier was responsible for placing a recruiting ad, drafting a posting notice, screening applicants, and performing initial interviews. The finalists were interviewed by the appropriate department head under Stier's oversight, and the department head then made a final selection. In the County's hiring process, Stier supported and assisted Department heads in hiring matters.^[1] He advertised and posted vacancy notices; received employment applications and sent letters acknowledging their receipt; screened applications for minimal qualifications; scored applications and assigned veterans

preference points; coded applications and entered them into a data base; tracked the status of applications; scheduled and performed initial interviews; rated and scored applicants after initial interviews and tests; scheduled interviews with the appropriate department heads; developed questions to be asked of all applicants; monitored the hiring process for compliance with affirmative action and anti-discrimination laws; notified applicants of their selection or rejection; and retained application files.

7. Stier also monitored the release of personal data under the Minnesota Government Data Practices Act; prepared necessary payroll, PERA and insurance forms for new employees; obtained necessary immigration forms; orientated new employees and provided them with information regarding County benefits, insurance, and policies; monitored probationary periods; completed necessary forms relating to status changes, leaves, promotions, and transfers; handled employee discipline, grievances, and discharges; dealt with disability leave, chemical dependency, and workers' compensation matters; established employee training programs; performed salary surveys; and monitored the County drug testing program.

8. Stier had no deputy. However, he had an administrative assistant (personnel secretary) to help him perform his job duties. He shared the services of this assistant, Sarah Carlson, with Gerald Jacobs, the County's risk manager. Stier, Jacobs and Carlson had separate offices in the first floor of the courthouse. Their offices were accessible from a common entrance off the first floor hallway.

9. On September 7, 1993, Carlson became the personnel secretary for Stier and Jacobs. She was interviewed by both, and they jointly agreed on her selection, but Stier had the final say in the matter. When Carlson was working for Stier, he assigned and directed her work, directed the scheduling, prioritizing and sequencing of her work, and reviewed her performance. When she was working for Jacobs, he assigned and directed her duties.

10. The County has approximately 400 employees. Most of them belong to one of nine or ten certified bargaining units. Most county supervisory employees, other than department heads, belong to the Organization of Non-Contract Employees (ONCE). Neither Stier nor Jacobs were members of ONCE or any other certified bargaining unit. However, they both belonged to an informal committee of department heads which periodically met to discuss management issues. Other committee members were the County's sheriff, auditor, assessor, treasurer and recorder.

11. As the personnel coordinator, Stier was annually reappointed as a member of two Board committees: the negotiation committee and the grievance committee. Each committee had four members: two Board members, Stier, and the Board's outside counsel, Thomas Fitzpatrick. Stier was responsible for assisting Fitzpatrick in negotiations. He scheduled meetings, worked closely with Fitzpatrick, and attended all negotiation committee meetings. Stier participated in closed sessions of the Board which were held to discuss negotiation strategies and other confidential information regarding contract negotiations and contract strategies. As a grievance committee member, Stier made recommendations regarding grievances to the committee and attended and participated in grievance arbitration and mediation. As a member of the County's grievance committee, Stier had input into the development of labor relations

and personnel issues and had access to confidential information relating to disciplinary actions and arbitrations.

12. The negotiating committee's prime objective was to implement an affordable comparable-worth salary plan.^[2] Stier was responsible for assisting in the development of a salary plan and was the Board's resource on comparable worth matters. Stier also was the County's contact person with the Minnesota Department of Employee Relations (DOER) regarding the plan and worked with DOER and the County's expert consultants, Ernst & Young, in developing the plan.

13. The County's comparable worth plan was initially developed in about 1986. The 1993 plan ranked all County jobs on the basis of necessary knowledge, skills, and training as well as the degree of responsibility and discretion exercised. Job descriptions were also developed at that time so that ranking could take place. Rankings were based on a band, grade, and subgrade. Stier's position was banded and graded as a D7, subgrade 1. A band of D was indicative of a more responsible position than those ranked from A to C. Likewise, a grade of 7 was a more responsible position than positions graded from 1 to 6. A D7 position is indicative of a relatively responsible, management-level job. In fact, only two County employees had more work points than Stier in the comparable worth study. Ex. 33. p.1 of 1993 study.

14. During the course of his employment, the Board only reviewed Stier's job performance once—on May 5, 1993. The evaluation generally stated that Stier had done a good job in employee recruitment and in advising the Board. However, concerns were expressed about the time it took him to develop the personnel policy manual and the methods used in addressing job classification and reclassification requests. Ex. 32. The Board's evaluation didn't mention Stier's role in negotiations.

15. Gerald E. Jacobs is an honorably discharged veteran of the United States Navy. He served from February 12, 1951 to January 27, 1955 when he was honorably discharged. Ex. 14. In 1957, Jacobs earned a bachelor's degree in business administration. He has been employed in the insurance and risk management fields since that time.

16. In 1987, Jacobs applied for a position with the County as its insurance risk manager. He was interviewed and hired by the Board and began full-time employment June 29, 1987. The County created the insurance risk manager position in conjunction with its 1986 decision to become self-insured and cancel all its commercial liability insurance, including workers' compensation insurance.

17. As the risk manager, Jacobs served on the Board's insurance, risk management and affirmative action committees. He was responsible for planning, directing, and administering a comprehensive risk management program for the County. He was required to collaborate with department heads and the County Board in facilitating and implementing the program; research risk liability and recommend solutions to reduce exposure; and administer the safety, employee benefit, and workers' compensation programs in accordance with applicable state and federal laws. Ex. 15.

18. Jacob's primary job tasks were as follows:

1. Researches and analyzes risks or potential risks to the County. Projects the impact and determines appropriate course of action to eliminate or reduce losses. Recommends strategic pro-active methods of treatment to the County Board.
2. Directs and participates in the underwriting, claims management, and loss control process. Represents the County in meetings with insurance companies, legal advisors, and other pertinent parties to facilitate the process.
3. Develops and coordinates a safety risk management program for all County employees. Collaborates with department heads and County management in the uniform application of program policies and procedures.
4. Negotiates county property claims against insurance providers. Conducts research and recommends strategy.
5. Develops and recommends Risk Management budget for the County. Prioritizes operational expenditures and recommends as appropriate. Monitors on an ongoing basis.
6. Complies [sic] and prepares reports pertaining to insurable values, accident, claims and injuries.
7. Administers the safety, employee benefit, and workers compensation program to assure compliance with government regulations. Collaborates with appropriate parties; conducts research and prepares reports.
8. Schedules union and regulatory inspections and makes appropriate recommendations/reports.
9. Performs other related duties of comparable level/type as required.

Ex. 15. Performance of these job duties required training and experience and necessitated the exercise of some discretion.

19. Although Jacobs's job position placed him in the personnel department or division under Stier's supervision, Stier never supervised Jacobs in the day-to-day performance of Jacobs's duties. Jacobs operated independently of Stier and reported directly to the County Board and its Building and Insurance Committees. In risk management matters, Jacobs reported to the insurance committee and made recommendations for its consideration. The insurance committee, in turn, made recommendations to the Board. In insurance matters Jacobs was a facilitator and resource person.

20. Jacobs was responsible for the County's compliance with occupational safety and health standards including the AWAIR program, right-to-know requirements, and the clean indoor air act. Jacobs also was responsible for scheduling covered

property for insurance purposes, filing insurance claims, and handling workers compensation matters.

21. When Jacobs was initially hired he worked closely with the County attorney investigating claims. He also reviewed risks and potential liabilities and made recommendations to the Board. In 1991, the Board decided to resume insuring the County against workers' compensation claims and other risks and became a member of the Minnesota Counties Insurance Trust (MCIT). Thereafter, Jacobs became a liaison between the County and MCIT.

22. In 1993, the Board transferred management of the maintenance department from the auditor to the risk manager, and Jacobs became the maintenance manager. His salary was not affected by these additional duties.

23. As the maintenance manager Jacobs was responsible for a maintenance and custodial crew consisting of a senior maintenance supervisor (Brian Miller) and five custodians. Jacobs was the link between the custodial crew and the Board and its Building Committee. Exs. 21, 22. Jacobs dealt with the Building Committee, which set major priorities, and he supervised maintenance and custodial personnel. He prioritized their daily tasks and prepared an annual budget covering maintenance and custodial costs. As a maintenance manager, Jacobs had authority to discipline maintenance personnel and to hire new personnel when needed. Jacobs was ultimately responsible for planning, budgeting, and scheduling maintenance and repairs; obtaining bids on construction projects; negotiating construction contracts; and inspecting new construction. Ex. 22. Because Jacobs had no training or experience in maintenance or construction, it was necessary for him to delegate responsibility to the maintenance supervisor or rely upon the maintenance supervisor for advice. The maintenance supervisor had day-to-day responsibility for maintenance matters.

24. As the risk manager, Jacobs occasionally met with the Board in closed session to discuss litigation and MCIT issues. He maintained a County file on all open claims. The files contained confidential information including privileged attorney-client correspondence. After the County became a MCIT member, the Board stopped soliciting Jacobs's advice on litigation matters.

25. Like Stier, Jacobs had no deputy, and Jacobs was the only employee, except for Carlson, who dealt with risk management matters.

26. The County's general fund balances between 1992 and 1995 were as follows:

1995 <u>Budget</u>	1994 <u>Actual</u>	1993 <u>Actual</u>	1992 <u>Actual</u>
RECEIPTS		11,771,469	10,362,956
10,231,355		9,211,182	
DISBURSEMENTS		<u>12,069,900</u>	<u>11,028,663</u>
<u>10,101,157</u>		<u>9,001,372</u>	
GROSS SURPLUS (DEFICIT)	(298,431)	(665,707)	130,198 209,810

LOAN REPAYMENT		<u>500,000</u>		
NET SURPLUS (DEFICIT)	(298,431)	(165,707)	130,198	209,810

Ex. 30. During the 3-year period prior to 1995, the County had reduced staff in the highway department and other areas.

27. In the fall of 1994, the Board was proposing a 10 percent levy increase to balance its budget. Many taxpayers objected to the proposed increase. At its meeting on December 20, 1994, the Board approved the budgets submitted by Stier and Jacobs (Exs. 9 and 25) and an overall budget having a \$250,000 deficit. Due to the budget deficit, Commissioner Mary Koep proposed a resolution calling for a \$250,000 budget reduction composed of unspecified cuts. Her resolution passed.

28. Both Stier and Jacobs were required to submit an annual budget to the Board for approval. This was not a difficult task. The bulk of their budgeted expenses consisted of salary, fringe benefits and administrative costs. Stier's 1995 budget, as approved by the Board on December 27, 1994, was \$82,975. Ex. 9. Jacobs's 1995 budget for risk management functions was \$78,123. Ex. 26. Jacobs's salary was indirectly funded by premium savings the County earned by having a risk manager and a risk management program. Ex. 42. In 1991, the total credits received by the County, which included credits for having a risk manager and a risk management program, were \$50,000. MCIT's underwriting policies provided premium credits based, among other things, on the County's safety management programs, overall insurance management, and risk management cooperation. For 1995, the premium savings the County enjoyed as a result of having a risk manager cannot be set with certainty, but likely would have been in the neighborhood of \$30,000. That consists of a \$27,811 credit for general liability risk management and \$3,843 credit for errors and omissions risk management. Exhibit 48.

29. The composition of the Board changed on January 1, 1995. The new Board consisted of Arthur F. Wagner, John Ferrari, Paul Thiede, Mary Koep, and Gilbert Dewes. Thiede and Dewes replaced former Commissioners Barbara Uppgaard and Cheryl Gelbmann.

30. At its meeting on January 3, 1995, the Board voted on a number of proposed resolutions to reduce the budget deficit. Some of the resolutions called for the elimination of County jobs. Five of the latter resolutions passed. The first eliminated the personnel coordinator's office, Stier's personnel coordinator position and Carlson's personnel secretary position. Exs. 3 and 45. The second abolished the office of insurance risk manager. Exs. 27 and 45. The others abolished one full-time forester position, one full-time maintenance position and a half-time solid waste position. Ex. 45. At the same meeting, the Board adopted other cuts. Among other things, it eliminated the Geographic Information Systems budget, reduced the appropriation to the Soil and Water Conservation District's budget by \$4,250, and reduced the appropriation for the Brainerd Lakes Area Development Corporation and the Cuyuna Range Development by \$7,500 and \$2,500 respectively. Ex. 45.

31. The resolutions of January 3, 1995 eliminating county positions were all made by Commissioner Wagner or Commissioner Koep. Wagner's resolutions eliminated the insurance and risk management positions. Koep seconded that motion. The other positions were eliminated on motion of Commissioner Koep. All commissioners except Ferrari voted in favor of the resolutions. Each of the resolutions eliminating positions or reducing budgets was predicated on the fact that the Board had resolved to reduce the general fund and departmental budgets by \$250,000 on December 20. Before the January 3 Board meeting, Wagner had discussed the resolutions he made at the meeting with other Board members.

32. On January 12, 1995, Wagner wrote to Stier and Jacobs advising them that their positions had been eliminated by the Board effective February 3, 1995. Exs. 10, 23. The letters didn't mention the Petitioners' hearing rights, if any, under the Veterans Preference Act. On or about January 18, 1995, Jacobs and Stier filed separate petitions with the Department of Veterans Affairs alleging that their positions were not abolished in good faith and that they were entitled to a hearing under the Veterans Preference Act. Exs. 11 and 14. This hearing followed.

33. In letters dated January 23, 1995, Jacobs and Stier filed requests for a Veterans Preference hearing with Wagner. On February 9, 1995, Wagner wrote to Jacobs and Stier advising them that the Board had received their January 23, 1995 requests for a veterans preference hearing and that their hearing requests were being denied because they were department heads and because the decision to abolish their positions was based on the legitimate administrative decision to make budgetary cuts. Exs. 12 and 24.

34. In the general elections held in the fall of 1994, the incumbent Crow Wing County Attorney, Jack Graham, lost to Donald F. Ryan. Ryan, like the newly elected commissioners, took office on January 1, 1995. Graham attributed his unsuccessful bid for reelection to Stier and Jacobs.

35. When Graham was the county attorney, he had several disputes with Stier. The disputes worsened in 1992 when a woman (charging party) in Graham's office filed sexual harassment charges against him. Stier investigated the harassment claim. After the charging party's discrimination charge was filed, other women in the County courthouse reported that Graham was entering the women's bathroom. Stier also investigated those allegations

36. After he investigated the various charges against Graham, Stier recommended that the charging party be transferred to a different department. The Board rejected his suggestion. Both Koep and Wagner stated that they didn't believe any of the women's charges were true. Subsequently, Stier advised the charging party to file her charges against Graham with the Minnesota Department of Human Rights. She did so. To date, the Human Rights Department has not made a probable cause determination on her charge.

37. Due primarily to Stier's involvement in the various charges against Graham, Graham began labeling Stier as the ringleader in a plot to remove him from office and destroy his career. Graham also began calling for Stier's termination. Graham made these statements in public forums, on the radio, and to newspaper reporters. Wagner

publicly supported Graham's statements. Koep did not publicly support them, but Koep, Wagner and Graham were political allies.

38. In 1994, the Board began excluding Stier from any closed sessions held to consider the charges made by the charging party. Thereafter, both Jacobs and Stier gave a statement to the charging party's attorney without first consulting with the Board or its attorney. Graham was particularly angry with Stier's behavior and both Wagner and Koep felt Stier had acted inappropriately. Graham requested Stier's dismissal, but the Board refused. Subsequently, in June 1994, Graham sued Stier in District Court. That action was dismissed on summary judgment in November 1994. Subsequently, in the last week of December 1994, Graham brought Stier before a grand jury and sought an indictment against him for destroying secret personnel files. The grand jury refused to indict him.

39. After the Board decided to eliminate Jacobs's and Stier's positions, Wagner began to inquire about the files maintained by Jacobs and Stier. Within a week or two after the January 3, 1995 Board meeting, Wagner talked to the auditor, Roy Luukkonen, about the security of the files. Wagner told Luukkonen that someone had to be responsible for them. Luukkonen agreed that the files should be protected. He told Wagner that he would accept custody of the personnel files only if he obtained control over them immediately following a Board resolution on the matter. Luukkonen understood that Wagner intended to get custody of the personnel records for Luukkonen and that the county attorney would get custody of the Jacobs's risk management files.

40. On January 31, 1995, the Board, on Koep's motion, resolved that "the offices of the Personnel Coordinator and Insurance Risk Manager are to be secured immediately." Ex. 46 at 2-3. The Board also gave custodial control of the personnel records to the auditor and gave custodial control of the risk management files to the county attorney. *Id.* On January 31, after these resolutions were passed, Wagner talked to Ryan about securing the files by changing the locks, which was the auditor's policy. Ryan didn't direct Wagner to change the locks that day, but he felt that there was merit to having Stier and Jacobs stop working before the effective date of their discharge on February 3 so that the files could be secured. Later that day, the locks on the door to Jacobs's and Stier's offices were changed without notice to them.

41. At about 7:30 a.m. on February 1, 1995, Stier arrived at work. His key wouldn't open the door to his office. About 15 minutes later, Carlson arrived. She found Stier sitting in the hallway. Stier told her his key wouldn't work. They unsuccessfully tried hers then located a custodian who let them in. About five minutes later Wagner and Graham came to their offices. Wagner stormed into their offices, but Graham waited outside. Wagner was upset. He told them that the auditor and the county attorney were now responsible for the records and that they should gather their belongings together and get out. By this time a newspaper reporter also appeared at the offices.

42. Stier tried to telephone Jacobs in Wagner's presence. Wagner reached for the telephone when Stier was dialing in an effort to prevent the call. He was

unsuccessful. When Jacobs answered, Stier advised him that he had better come to work because they were being locked out.

43. Jacobs, who was on personal leave on February 1, went to his office as soon as possible after Stier's call. Wagner was present. He advised Jacobs to get his things and get out. Jacobs questioned his authority for the order because he was concerned about confidential records in the office pertaining to the sex discrimination charges and other matters. Jacobs tried to call MCIT to get their advice regarding Wagner's actions, but Wagner took the phone from him and disconnected it. Stier, Jacobs, and Carlson then went to the third floor of the courthouse to meet with the county attorney regarding control of the files. Ryan advised them he would call the trust and secure the files.

44. On or about January 6, 1995, Wagner talked to Carlson at work. After satisfying himself that they were alone, he told Carlson that he was sorry about her job but that something had to be done about Stier and Jacobs. Their conversation was interrupted when Jacobs returned, at which time Wagner left. Later that day Wagner talked to Carlson again. At that time, he told her he was working on something for her. He said that he might be able to create a new position but it couldn't be in the personnel area because that had been eliminated and if she was given a personnel position it would appear that Stier had been fired. He told her he knew she had been doing all the work anyway and said that the personnel committee had previously done this work before but that someone would be needed to do the paperwork. Carlson understood that some of her current duties would be reassigned to her in the future.

45. Following the events on February 1, Carlson was on vacation for one week. She was then appointed to a temporary position and, the week prior to the hearing, she obtained a full-time clerical position in the county attorney's office. In that position she has not been doing any of the duties she performed as a personnel secretary.

46. After his job was abolished, most of Stier's duties were assumed by the Board's personnel committee. The committee took over the development and implementation of personnel policies and procedures, compensation and classification programs and reports, equal employment opportunity policies, and grievance arbitration. Stier's involvement in hiring reverted to the local job service office, the personnel committee and department heads. Many of Stier's other duties and responsibilities have not been specifically reassigned and are not being performed.

47. Jacobs's duties as the maintenance manager have been given to Brian Miller, a nonveteran. Some of Jacobs's risk management duties apparently will be assumed by the insurance committee, but many of his duties have not been formally recognized or assigned and are not being performed.

48. No new employees have been hired to perform the work previously performed by Stier and Jacobs.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Under Minn. Stat. §§ 197.481 and 14.50 (1994), the Administrative Law Judge and the Commissioner of Veterans Affairs are authorized to determine if the Petitioners are entitled to a veterans preference hearing or any other relief as a result of the County's decision eliminating their positions.

2. Petitioners and Respondent received timely and proper notice of the hearing.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Petitioners are veterans within the meaning of Minn. Stat. §§ 197.46 and 197.447 (1994).

5. Minn. Stat. § 197.46 (1994) prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing. However, public employers may abolish positions notwithstanding the Veterans Preference Act if the abolition of the position is in good faith. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986); State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923).

6. The burden of proof is upon the Petitioners to prove by a preponderance of the evidence that they were veterans who were terminated without a hearing under Minn. Stat. § 197.46. The Respondent has the burden of proof to establish that the Petitioners are department heads or strictly confidential employees who do not have a right to a hearing on the abolishment of their positions.

7. The Respondent's claim that the Petitioners' positions were abolished in good faith is an affirmative defense on which the Respondent has the burden of proof. Minn. Rules pt. 1400.7300, subp. 5; Martensen v. Minneapolis Board of Education, OAH Docket No. 55-3100-8473-2 (April 13, 1994) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated June 30, 1994); Oleson v. Benton County, OAH Docket No. 69-3100-5670-2 (Aug. 26, 1991) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated Oct. 1, 1991); Obedoza v. Metropolitan Transit Commission, OAH Docket No. 4-3100-5640-2 (March 4, 1992) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated Oct. 23, 1991), aff'd (without discussion of burden of proof), 1992 W.L. 350279 (Minn. App. 1992).

8. The Petitioners were removed from their positions as Personnel Coordinator and Risk Manager within the meaning of Minn. Stat. § 197.46 (1994) when the Respondent's Board of County Commissioners eliminated their positions as of February 3, 1995.

9. The Respondent has not proven by a preponderance of the evidence that the Petitioners were department heads or strictly confidential employees so as to be exempt from the provisions of the Veterans Preference Act under Minn. Stat. § 197.46 (1994).

10. The Petitioners were not terminated for incompetency or misconduct. Moreover, the Respondent's removal of the Petitioners was not accomplished due to a good faith abolition of their positions.

11. The Respondent has denied the Petitioners rights provided to them by the Veterans Preference Act in that it removed the Petitioners in violation of Minn. Stat. § 197.46, and failed to provide them with the notice required by that statute.

12. The Petitioners are entitled to be reinstated as of February 3, 1995, and receive all status, back pay, and benefits they would have received consistent with such employment.

13. These Conclusions are reached for the reasons discussed in the Memorandum below, which is hereby incorporated by reference.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the Commissioner of Veterans Affairs order:

1. That the petitions of Gerald E. Jacobs and Siegfried Stier be GRANTED.
2. That Respondent Crow Wing County immediately reinstate the Petitioners to their positions as Risk Manager and Personnel Coordinator.
3. That the Respondent reimburse the Petitioners the amount of pay they would have received had they been employed since February 3, 1995, plus the value of any benefits the Petitioners would have received, together with interest thereon at the statutory rate from the date such payments should have been made.

Dated this 1st day of November, 1995

/s/

JON L. LUNDE
Administrative Law Judge

Reported: Taped; 10 tapes

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Under Minn. Stat. § 197.46, "[n]o person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." The Minnesota Supreme Court has recognized, however, that the Veterans Preference Act is not intended to prevent public employers from abolishing positions in good faith. Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986); State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923).

The Petitioners served in the armed forces of the United States, were separated under honorable conditions, and are, therefore, veterans as defined in Minn. Stat. § 197.447. Hence, they are entitled to the protections afforded to veterans by Minn. Stat. § 197.46. The primary issues for decision in this case are whether the Petitioners were

department heads or strictly confidential employees exempt from the protections of the Veterans Preference Act and, if they are covered by the Act, whether their positions were abolished in good faith.

I. Exemption for Department Heads

As a threshold matter, Respondent argues that even though the Petitioners are veterans as defined in Minn. Stat. § 197.447, they were not entitled to a hearing prior to their removal from employment because they were department heads. The Respondent's argument is based on the language in Minn. Stat. § 197.46 (1994), which states that "[n]othing in section 197.455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer." While this section of the Act does not expressly exempt department heads from the notice and hearing requirements, the Minnesota Supreme Court has held that they are excluded by implication as a result of the statute's explicit exclusion of chief deputies of department heads. State ex rel. Sprague v. Heise, 243 Minn. 367, 373, 67 N.W.2d 906, 911 (1954); State ex rel. McOsker v. City Council of Minneapolis, 167 Minn. 240, 208 N.W. 1005 (1926).

The burden to establish that a veteran is the head of a department is on the Respondent. Minn. Stat. § 194.46 (1994); Holmes v. Wabasha County, 402 N.W.2d 643 (Minn. App. 1987). As noted in James v. City of Marshall, OAH Docket No. 69-3100-7968-2 (Aug. 2, 1993) (adopted by the Commissioner of Veterans Affairs in a Decision and Order dated Nov. 10, 1993), "[t]he department head exception to the Veterans Preference Act is quite narrow. . . . [To be within the exception the] department head must be very high level, it must be a position essentially equivalent to an elected official." Id. at 11. To constitute a department head, individuals must be "vested with discretion in the performance of their duties, not subject to direction from superior authority but on the contrary possessing the necessary authority to appoint clerks and subordinates." State ex rel. McOsker v. City Council, 167 Minn. 240, 242, 208 N.W. 1005, 1006 (1926).

The "head of a department" ordinarily means the head of some government division that is "important enough" to have a deputy, as "only such departments [can] be excluded as a separate department." Sprague, 67 N.W.2d at 912. The Minnesota Supreme Court noted in Sprague that, "[w]hile cases may arise where a department has only one employee, who thereupon would be the head of the department, we believe that ordinarily, before anyone could be classified as a head of a department, the department must be sufficiently important as to include more than one employee." Id. To date, it appears that no Minnesota cases have found that an individual in a one-person office is a "department head" within the meaning of the Act. See Holmes v. Board of Commissioners, 402 N.W.2d 642, 645 (Minn. App. 1987). It follows, therefore, that individuals who are in charge of offices that have no chief deputy are generally not considered to be department heads exempt from the protections in section 197.46.

The Minnesota Supreme Court has identified several factors which must be considered in determining whether an employee is a department head:

1. Does the alleged department head have charge of the work done by his department?
2. Does his work require technical, professional training?
3. Is he the highest authority at that level of government as to his official duties?
4. Does he supervise all of the work in his department?
5. Does the success of his department depend on his technique?
6. Are the employees in the department under his direction?
7. Are his duties more than merely different from other employees?
8. Does he have power to hire and fire subordinates?

State ex rel. McGinnis v. Police Civil Service Commission, 253 Minn. 62, 75, 91 N.W.2d 154, 163 (1958).

A. Stier's Personnel Coordinator Position

Petitioner Stier was the Personnel Coordinator for the Respondent. The personnel section was not "important enough to have a deputy." In fact, except for a part-time secretary, the County's entire personnel office was composed solely of Stier^[3]. Thus, applying the Sprague standard, it generally would not be appropriate to consider the personnel section a separate department or Stier a department head for purposes of Minn. Stat. § 197.46.

A consideration of the factors set forth in McGinnis supports that conclusion. With respect to the first, third, fifth, and eighth factors, it is clear that Stier was responsible for the personnel work done in the personnel office by himself and his part-time secretary/assistant and that he had the authority to direct the work of his secretary. Stier was not, however, the highest authority as to his official duties. Nearly everything Stier did was subject to the control of the County Board. The Board supervised Stier on a weekly basis, directly controlled the bulk of his work, and had full authority over him. Stier consulted with the Board on a weekly basis regarding such matters as hiring authority, staff, and personnel policy development. He had no authority to set priorities, implement personnel policies, or impose compensation and classification plans on his own, but acted only in accordance with Board directives. The Board set staffing and selection policies and procedures, approved training program recommendations made by Stier, and reviewed and finally approved personnel policies and procedures Stier recommended. The success of the personnel section depended somewhat upon Stier's techniques, but the approaches taken were ultimately subject to Board control. Stier also did not have the power to hire or fire employees. That power was held by the Board. Stier was required to seek authority from the Board to hire his secretary and, if he had wished to discharge his secretary, he would also have been required to recommend to the Board that she be discharged and obtain the Board's approval. The Board did, however, nearly always

follow the recommendations of "department heads" in this regard. In addition, although Stier screened applicants for jobs in other sections and conducted initial interviews, the pertinent department head decided who would be called back for second interviews and made the final hiring decision, subject to Board approval.

With respect to the second McGinnis factor, it is evident that Stier's job did require some on-going, specialized training. The position did not, however, require a specialized degree. The minimum qualifications for the job were a B.A. degree in industrial relations, business, human resources, or a related field, or the equivalent, and five years' experience "in the specialty areas designated by the job tasks." Ex. 1.^[4]

The fourth, sixth, and seventh McGinnis factors implicitly reflect the requirement that an individual ordinarily must work in an office composed of more than one employee in order to be deemed to be a department head. See Holmes, 402 N.W.2d at 645. These factors appear to invite comparison between the purported "department head" and his or her co-workers in the department who, presumably, are involved in the substantive work of the department. There were no such co-workers in the personnel section; the only person in the personnel section other than Stier was his part-time secretary. Stier was obviously in charge of the work he did himself, and he also supervised the work done by his part-time secretary. He had the authority to assign work to his secretary and prioritize her work. In addition, his duties were significantly different from those of his part-time secretary. His secretary performed clerical and administrative work. Stier's responsibilities included recommending personnel policies and procedures; assisting in the negotiation of labor agreements; developing and administering compensation, classification, affirmative action, and training programs; developing and administering staffing and selection policies and procedures; monitoring the hiring process; resolving EEO concerns; responding to daily personnel issues; and developing and monitoring a budget. Because the analysis of these factors in the present case merely underscores a fairly typical difference between the nature and complexity of work performed by a supervisor engaged in a substantive area of work and a subordinate engaged in clerical or administrative work, the Judge finds that these factors are not significant in assessing whether Stier was a department head. Stier had some important job duties. However, he was not involved in running a department. Rather he served as a resource person and adviser to the Board, department heads, and county employees.

On balance, based upon a consideration of all of the McGinnis factors and the absence of the deputy generally required by Sprague, the Administrative Law Judge concludes that Stier was not a department head so as to render him exempt from the protections of the Veterans Preference Act^[5] Stier simply did not have the requisite level of "authority, responsibility, independence of action and degree of critical decision making authority" to be a department head. James at 11. He did not have the authority to hire or fire even his own secretary without Board approval. Although he could direct the work of his secretary, the definition of "department head" contained in the Act is clearly not intended to encompass every veteran who happens to supervise one part-time clerical employee. While Stier was occasionally permitted to exercise some discretion in carrying out some of his more routine job duties (for example, he could maintain the personnel data base, conduct initial interviews of job applicants, approve extensions to the probationary periods of employees, and handle sick leave requests), the performance of his job duties

was, for the most part, subject to the direction and supervision of the Board. His position as Personnel Coordinator thus does not come within the department head exception to the Veterans Preference Act. Accord: State ex rel. Caffrey v. Metropolitan Airports Commission, 310 Minn. 480, 486-87, 246 N.W.2d 637, 641 (1976) (Director of public affairs was not a department head where he and his secretary were the only employees in his office, he did not have authority to hire or fire others, and he was supervised by others); Johnson v. City of Wells, 1990 W.L. 72134 (Minn. App. 1990) (chief of police was not a department head where he was more of a team leader than a manager or supervisor, had limited authority over matters that required the use of discretion, and the mayor, city council and police committee had sole authority to set policies, establish rules, and issue directives); Holmes v. Board of Commissioners, 402 N.W.2d 642 (Minn. App. 1987) (individual serving as zoning administrator, agricultural inspector, and civil defense director for county who was assisted in each area only by a secretary was not a department head where his duties were largely ministerial, he was subject to board directives in matters requiring the exercise of discretion, and he lacked authority to hire or fire his secretary or other subordinates).

B. Jacobs's Position as Risk Manager/Maintenance Supervisor

1. Risk Manager Duties

In his capacity as Risk Manager, Jacobs, like Stier, was a one-person office with the exception of his part-time secretary/administrative assistant, whom he shared with Stier. He did not have a deputy to assist him in his duties. Although Jacobs's job was formally placed in the personnel office under Stier's supervision, Stier never supervised him in the day-to-day performance of his duties. Jacobs operated independently of Stier and reported directly to the County Board. Thus, with respect to the Risk Manager portion of his duties, Jacobs, like Stier, should not be considered a department head under the Sprague standard because the position was not sufficiently important to merit a deputy.

In addition, when the McGinnis factors are taken into consideration with respect to the Risk Manager portion of Jacobs's duties, it is evident that he did not serve as a department head within the meaning of the Act when carrying out his Risk Manager functions. With respect to the first, third, fifth, and eighth McGinnis factors, it is evident that Jacobs, as the sole employee in the Risk Management area other than his secretary/assistant, was in charge of the work done by himself and his secretary. It is equally clear, however, that Jacobs was required to act in accordance with the Board's directives and could not act on his own. He researched and evaluated the risks and exposure faced by the County and made recommendations to the Board, served as the liaison between the County and the Minnesota Counties Insurance Trust ("MCIT"), submitted recommended budgets to the Board, and made recommendations to the insurance committee which, in turn, made recommendations to the County Board. He basically served as technical staff to the Board and department heads on insurance issues. His duties were under the direct control of the Board. Although he had the authority to assign and prioritize the work of his secretary, he and Stier were required to seek the Board's approval prior to hiring her. Jacobs was not the highest authority as to his official duties, since the Board had full control and authority over him. The success of the risk management function did not depend upon Jacobs's techniques because the approaches taken were ultimately subject to Board control. Jacobs did not have the power to hire or fire employees; the Board had that authority, although it usually ruled in accordance with employee recommendations.

With respect to the second factor set forth in McGinnis, continuing education, training, and experience were necessary in order to perform the risk management function. The minimum qualifications for the job were a B.A. degree in public administration, business insurance, or a related field, or equivalent, plus five years' experience in two of the following areas: risk management, human resources, loss control, safety engineering, or commercial insurance programs. Ex. 15.^[6]

With respect to the fourth, sixth, and seventh McGinnis factors, Jacobs, like Stier, was in charge of the work he did himself and assigned and supervised the work of his part-time secretary/assistant. Jacobs's duties were significantly different from those of his part-time secretary. His secretary performed clerical and administrative work, while Jacobs's responsibilities included researching and analyzing potential risks to the county, directing and participating in underwriting, claims management, and loss control, developing and coordinating a safety risk management program, developing and recommending a budget,

and administering the safety, employee benefit, and workers' compensation program. Of course, as emphasized above, it is significant that the only employee in the risk management area other than Jacobs was his part-time secretary/assistant. Once again, the Judge finds that these factors are not significant in assessing whether Jacobs served as a department head in performing the risk management functions because the analysis of these factors merely reveals the usual differences between the nature and complexity of work performed by a supervisor engaged in a substantive area of work and a subordinate engaged in clerical or administrative work.

Based upon a consideration of the McGinnis factors and the absence of a deputy under Sprague, the Administrative Law Judge concludes that Jacobs was not a department head with respect to his Risk Manager functions so as to render him exempt from the protections of the Veterans Preference Act. Jacobs, like Stier, did not exercise the requisite level of "authority, responsibility, independence of action and degree of critical decision making authority" to be a department head. James at 11. He did not have the authority to hire or fire even his own secretary without Board approval. It appears that Jacobs exercised even less discretion than Stier in carrying out his routine job duties. It is clear that his duties were under the direct control and supervision of the Board. His Risk Manager position thus does not fall within the department head exception to the Veterans Preference Act.

2. Maintenance Manager Duties

Unlike Stier, Jacobs had additional responsibilities in another section. In 1993, the Board transferred management of the maintenance department to Jacobs. Jacobs became the maintenance manager and was responsible for a maintenance and custodial crew consisting of a senior maintenance supervisor and five custodians. Because Jacobs had no training or experience in maintenance or construction, it was necessary for him to delegate responsibility to the Maintenance Supervisor or rely upon the Maintenance Supervisor for advice. The Maintenance Supervisor in fact had day-to-day responsibility for maintenance matters.

The job description prepared by Jacobs regarding his Maintenance Manager duties indicates that the Maintenance Manager was responsible for "[c]oordinat[ing] and direct[ing] the maintenance of buildings equipment and machinery of the three major buildings in the County Government Complex by performing the following duties [planning, budgeting, and scheduling facilities maintenance and repairs, inspecting construction and installation progress to ensure conformance to established specifications, reviewing contracts for compliance with government specifications and regulations, overseeing and directing maintenance/custodial personnel and workers, and preparing department budget and monitoring expenditures] personally or through subordinate supervisors." Ex. 22 (emphasis added.) Applying the first, third, fifth, and eighth factors set forth in McGinnis it appears that Jacobs was ultimately responsible for supervising the Maintenance Supervisor and custodial personnel. He prioritized their work and prepared an annual budget covering maintenance and custodial costs. However, as discussed above, Jacobs had no technical background in these areas and, as a result, relied upon the Maintenance Supervisor (Brian Miller) for advice and delegated the day-to-day responsibility to him. Jacobs was ultimately responsible for seeing that the maintenance staff did their jobs,

generally knew what the maintenance and custodial staff were doing, and had authority to discipline maintenance personnel and hire new personnel when necessary. He did not conduct daily inspections or have close contact with maintenance and custodial personnel on a daily basis. Jacobs's primary role was to serve as the link between the custodial crew and the Board and its Building Committee. Because the Building Committee and the Board set major priorities and controlled long-range planning of maintenance functions, Jacobs did not have charge of the work done by his department and was not the highest authority as to his official duties. In addition, the success of the department probably did not depend on his technique, since he lacked technical knowledge. Jacobs did have authority to discipline maintenance and janitorial staff and to hire new staff.

With respect to the second McGinnis factor, it is evident that Jacobs's work as Maintenance Manager did not require technical or professional training or experience in maintenance, since he had no such training or experience. While it would be logical to presume that Jacobs's training and experience in business administration was helpful to him in carrying out his duties, no evidence was presented to suggest that such training and experience were required for the Maintenance Manager position. Moreover, there is no indication that Miller (who now performs the duties of Maintenance Manager) has business administration training or experience.

With respect to the fourth, sixth, and seventh factors, the evidence presented demonstrated that, while Jacobs was generally aware of what maintenance and custodial personnel were doing and oversaw their work, in reality it was primarily the Maintenance Supervisor who supervised and directed the work in the maintenance department. The Maintenance Supervisor occasionally communicated directly with the Board and the Auditor about maintenance issues. Jacobs's duties were purely managerial in nature and thus were substantially different from those of the maintenance and custodial staff. Significantly, after Jacobs's was terminated by the Respondent, the Maintenance Supervisor (Miller) took Jacobs's place on the Building Committee and now reports directly to the Board at all times. Wagner testified that there was no difference between what Brian Miller does now and what he did when Jacobs was Maintenance Manager.

Based upon all of these factors and the absence of a "deputy" in the maintenance department, the Administrative Law Judge concludes that Jacobs was not acting as a department head with respect to his Maintenance Manager duties. Although he had the authority to hire and discipline subordinates, he did not exercise any other significant authority and responsibility in the position, perhaps because he lacked the necessary technical background to become very involved in the department's activities. For the most part, Jacobs merely relied upon the Maintenance Supervisor. The Board and the Building Committee controlled decision making on major maintenance questions. When Jacobs did direct work performed by maintenance staff, he frequently was acting merely as a conduit between the committee or Board and the staff. Under these circumstances, Jacobs did not serve as a department head. Accord: Johnson v. City of Wells, 1990 W.L. 72134 (Minn. App. 1990) (Chief of police was not a department head where he was more of a team leader than a manager or supervisor, handled routine decisions but had limited discretionary authority, did not control the daily activities of the other officers, and frequently acted as a mere conduit between a police committee or the council and other police officers, and where the mayor, city council, and police committee had sole authority

to set policies, establish rules and regulations, and issue directives); Christy v. City of Sacred Heart, OAH Docket No. 8-3100-7314-2 (Feb. 1, 1993) (municipal liquor store manager was not a department head where his activities were closely scrutinized by the city council, any significant decisions were subject to council approval, his duties were largely ministerial, and he was not present in the store to supervise employees about half the time that the liquor store was open).

II. Exemption for Employees who have a Strictly Confidential Relationship to the Appointing Authority

As discussed above, the Veterans Preference Act also does not apply to "any person holding a strictly confidential relation to the appointing officer." Minn. Stat. § 197.46 (1994). The burden to establish that a veteran is a strictly confidential employee is on the political subdivision. Id.; Holmes v. Wabasha County, 402 N.W.2d 643 (Minn. App. 1987).

The Respondent argues that Stier and Jacobs occupied a strictly confidential relationship to the County Board and must, for that reason, be considered to be outside the coverage of the Veterans Preference Act. The Act does not define the phrase "strictly confidential." The Respondent urges application of the definition of "confidential employee" contained in the Public Employer Labor Relations Act ("PELRA"). In that statute, a "confidential employee" is defined as "any employee who: (1) has access to information subject to use by the public employer in meeting and negotiating; or (2) actively participates in the meeting and negotiating on behalf of the public employer." Minn. Stat. § 179A.03, subd. 4 (1994). The Petitioners argue that the use of the term "strictly confidential" in the Veterans Preference Act makes it clear that that exemption was to be more narrowly construed, and points out that the mere fact that an employee has access to private data or at times attended closed meetings of the Board and responded to questions from the Board should not be sufficient to show that the employee holds a position that is strictly confidential to the appointing authority. In particular, the Petitioners assert that the Respondent has not shown the frequency with which Stier and Jacobs attended closed meetings or the extent to which they participated in such meetings.

The definition of "confidential employee" contained in Minn. Stat. § 179A.03 applies only for the purposes of PELRA and thus has no particular application here. See Minn. Stat. § 179A.03, subd. 1 (1994). Moreover, as stressed by the Petitioners, the Veterans Preference Act does not exempt "confidential" employees, but instead exempts persons who hold a "strictly confidential relation" to the appointing authority. In the absence of a statutory definition, the phrase should be construed in a fashion consistent with its ordinary meaning. Minn. Stat. § 645.08(1) (1994). "Strictly" is defined in Webster's Third New International Dictionary at 2261 (1971) to mean "in a strict manner; without latitude; closely, precisely, rigorously, stringently, positively." Similarly, the term is defined in Black's Law Dictionary at 1591 (Rev. 4th Ed. 1968) to mean "[a] strict manner; closely, precisely, rigorously; stringently; positively." "Confidential" is defined in Webster's Third New International Dictionary at 476 to mean "communicated, conveyed, acted on, or practiced in confidence; known only to a limited few; not publicly disseminated; private, secret" and in Black's Law Dictionary at 370 as "entrusted with the confidence of another or with his secret affairs or purposes; intended to be held in confidence or kept secret."

In Possin v. St. Paul Public Schools, OAH Docket 69-3100-5513-2 (Aug. 29, 1991) (adopted by Commissioner of Veterans Affairs in Decision and Order dated Oct. 24, 1991), the respondent also argued that the PELRA definition of “confidential employee” should be applied under the Veterans Preference Act. Judge Mihalchick declined to apply the definition and emphasized that the language of the Veterans Preference Act exempting employees who have a “strictly confidential relation” to the appointing authority must be given a narrower construction:

The statutory exception must be read in context. The statute provides an exception for a person who is a private secretary, teacher, superintendent of schools, the one chief deputy of any elected official or head of a department or any person holding a strictly confidential relation to the appointing officer. The strictly confidential relation exception applies to only those positions that work so closely with the appointing official that allowing the appointing official to employ and discharge the person at will is appropriate. General Drivers Local #346 v. Aitkin County Board, 320 N.W.2d 695 (Minn. 1982). (The scope of the exception contained in Minn. Stat. § 197.46 is quite clear. The use of the term “one chief deputy” excludes any interpretation that deputies fall within the confidential employee exception.) State ex rel. Sawyer v. Mangni, 231 Minn. 457, 43 N.W.2d 775 (1950). (The first assistant city attorney is not a deputy and does not hold a strictly confidential relation to the city attorney because his work is no different from that of the other assistants.)

Id. at 8-9.^[7] The Administrative Law Judge agrees that the application of the PELRA definition in Veterans Preference matters would result in an overly broad construction of the expressly narrow exemption set forth in the Act. Accordingly, the Respondent’s argument in this regard must be rejected.

The exemption in the Veterans Preference Act for employees who have a strictly confidential relationship with their appointing authority has not been applied with much frequency in administrative or judicial proceedings and the results have been varied. See, e.g., State ex rel. Sawyer v. Mangni, 231 Minn. 457, 43 N.W.2d 775 (1950) (position of first assistant city attorney is not exempt from Veterans Preference Act where the city attorney had no voice in the selection of a first assistant and the evidence did not show a close relationship between the city attorney and his first assistant); State ex rel. Cassill v. Peterson, 194 Minn. 60, 259 N.W. 696, 698 (1935) (accountant in the inheritance tax department of the Attorney General’s Office had duties that “were much more than merely clerical or technical” and held a position that was “clearly confidential in its every purpose,” and thus was found to have a strictly confidential relation to the Attorney General; court emphasized that a statute provided that the Attorney General had the power to appoint and “at his pleasure remove” assistants in his office); State ex rel. Tamminen v. City of Eveleth, 189 Minn. 638, 249 N.W. 194 (1933) (although given the title “deputy city clerk,” the position in fact occupied by the plaintiff was that of a bookkeeper and general office clerk; plaintiff did not have a strictly confidential relation to the city council); Ulmer v. City

of Duluth, 428 N.W.2d 855 (Minn. App. 1988) (assistant city attorney had a strictly confidential relationship with the city attorney where assistant city attorney was empowered to act in the city attorney's stead as his alter ego and was an appointee whose position was retained at the pleasure of his appointive officer).

Several principles emerge from these and other cases construing the Veterans Preference Act. First, it is clear that a determination of whether the exemption applies hinges upon an examination of the actual duties associated with the position at issue and the relationship between the individual and the appointing authority, and does not depend solely upon the assigned job title. Gramke v. Cass County, 434 N.W.2d 4, 6 (Minn. App. 1989), rev'd on other grounds, 453 N.W.2d 22 (Minn. 1990); Tamminen, 249 N.W. at 185-86. Second, as a general matter, it is important to consider whether the employee occupied a confidential position of trust that makes at-will employment appropriate and whether the employee has the power to act in the appointing authority's stead and as the appointing authority's alter ego. See Cassill, 259 N.W. at 698; Ulmer, 428 N.W.2d at 856-57; Ehret v. City of Benson, OAH Docket No. 69-3100-5025-2 at 10 (Dec. 21, 1990) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated March 18, 1991).

A. Stier's Position

Stier was appointed to his Personnel Coordinator position by the County Board and reported directly to the Board. He served on the negotiations committee and the grievance committee. Tom Fitzpatrick, outside counsel for the County, in fact was the primary person responsible for negotiating the County's labor agreements. The Board set policy, established amounts that could be offered, approved any tentative agreements, and arrived at final positions that could be taken in negotiations. The negotiations committee made recommendations to the Board, which it generally accepted. Stier's primary function in the negotiation of labor agreements was to provide support to Fitzpatrick. Stier had hundreds of contacts with Fitzpatrick during 1994 regarding labor relations and personnel matters. He contacted union representatives to schedule meetings, provided raw data and data analysis to Fitzpatrick for his use in the negotiations, and acted in an advisory capacity to Fitzpatrick. He tried to attend all negotiation sessions and participated and gave his opinion in closed Board strategy sessions. Stier had access to all of the confidential information that the Board had. He discussed privileged material with Fitzpatrick and also had conferences with the Board's C.P.A. After Stier was hired, the County used Fitzpatrick even more extensively in labor negotiations than it had previously. Both Wagner and Koep were critical of Stier for not taking a more active role in labor negotiations.

Stier was present during closed Board meetings discussing labor negotiations or litigation, with the exception of some closed meetings held late in 1994 involving the individual who claimed that she had been sexually harassed by the County Attorney. He had input into committee discussions and recommendations regarding lawsuits and grievances. Stier also participated and made recommendations to the grievance committee regarding appropriate action on grievances and sometimes testified at grievance arbitrations. Stier handled grievances at the step 2 stage, after they had been denied by the department head, and made decisions usually after consulting with counsel. If grievances proceeded to level 3, Stier made recommendations to the Board.

Stier had access to personnel records containing private data. Board members sought his advice on personnel and legal issues. He gathered statistical data regarding comparable worth and served as the County's contact person with the Department of Employee Relations. He prepared comparable worth reports for DOER, which were signed by the Board chair. Stier made recommendations to the Board regarding training programs, personnel policies, and employee compensation and classification plans, which were subject to Board approval.

It is evident that Stier was frequently privy to private or confidential data regarding County personnel, labor negotiations, lawsuits, and grievances in the performance of his job duties as Personnel Coordinator. It is also clear that he at times was a participant in closed strategy sessions with the Board. The Administrative Law Judge concludes, however, that the Respondent did not bear its burden to show that Stier had a "strictly confidential" relationship with the Board within the meaning of the Veterans Preference Act.

Mere access to private or confidential data is simply not enough. See, e.g., Possin v. St. Paul Public Schools, OAH Docket No. 69-3100-5513-2 (Aug. 29, 1991) (rejecting application of PELRA definition of “confidential employee” in proceeding under the Veterans Preference Act and holding that a human resource specialist did not have a strictly confidential relation to the school board, the human resource director, or the supervising assistant human resource director). Stier did not have the power to act in the Board’s stead or as its alter ego; rather, his recommendations on matters of any import were never implemented without Board review and approval. There was no evidence that Stier occupied a confidential position of trust that made at-will employment appropriate. In fact, the County’s Personnel Manual indicates that employees (defined to include appointed or elected persons holding paid positions within the County) are to be disciplined or discharged from employment based on just cause. Ex. 43, § 22.03.^[8] The County did not refute Stier’s testimony that he spent only about ten percent of his time on labor negotiation matters every other year (when nine to ten contracts were up for renegotiation), that ninety percent of that time was spent actually attending the negotiation sessions, and that he spent almost no time on labor negotiations during the “off” years. Moreover, Koep testified that the Board met in closed session only approximately six to eight times during 1994,^[9] and Stier was apparently excluded from one or more of the closed sessions held late in 1994. There simply was not an adequate showing by the County that Stier had a sufficiently close relationship with the Board to render him a “strictly confidential” employee within the meaning of the Veterans Preference Act. A “strictly confidential” relationship is one which is confidential in all its parameters and not just to some specialized areas.

B. Jacobs’s Position

Jacobs was hired by the County Board in 1987. When he was first hired, he worked closely with the County Attorney’s Office in investigating claims. He also made recommendations to the Board based upon his review of risks and potential liabilities. In 1991, after the Board decided to become a member of the Minnesota Counties Insurance Trust (“MCIT”), Jacobs became a liaison between the County and the MCIT. He advised the MCIT of claims. He served on the Board’s insurance, risk management, and affirmative action committees. He served as facilitator to the insurance committee and made recommendations for it to consider. The committee, in turn, made recommendations to the County Board. Jacobs’s responsibilities included recommending proactive approaches to the Board to eliminate or reduce losses. He attended closed sessions of the Board to discuss MCIT issues and litigation. He was excluded from closed meetings in some instances. After the County was insured by the MCIT, the Board did not ask his opinion on litigation. Jacobs maintained County files on open claims and had access to confidential information such as attorney work product, attorney-client information, and other private data.

Jacobs clearly had access to private or confidential data in the performance of his job duties as Risk Manager.^[10] It is also clear that he at times attended closed sessions with the Board. The Administrative Law Judge concludes, however, for the same reasons discussed above, that the Respondent did not bear its burden to show that Jacobs had a “strictly confidential” relationship with the Board within the meaning of the Veterans Preference Act. Once again, it is not sufficient to merely show that he had access to

private or confidential data. Jacobs did not have the power to act in the Board's stead or as its alter ego. His recommendations were subject to Board review and approval. There was no evidence that Jacobs occupied a confidential position of trust that made at-will employment appropriate. In fact, the County's Personnel Manual required that he, like Stier, be discharged from employment based on just cause. Ex. 43, § 22.03. Because Jacobs was excluded from some closed sessions, the total number of closed meetings he attended with the Board during 1994 must be less than the total of six to eight meetings estimated by Koep to have occurred during 1994. There was no evidence regarding the extent to which Jacobs participated in the closed sessions he attended. Jacobs's testimony that the Board did not ask his opinion about litigation after the County was insured by the MCIT was not contradicted by the Respondent. Based upon all of the evidence, the County did not make an adequate showing that Jacobs had a sufficiently close relationship with the Board so as to render him a "strictly confidential" employee within the meaning of the Veterans Preference Act.

III. Elimination of Positions

The Minnesota Supreme Court has recognized that the Veterans Preference Act is not intended to prevent public employers from terminating the employment of a veteran by abolishing the position he held "if the action abolishing it be taken in good faith for some legitimate purpose and not a mere subterfuge to oust him from his position." State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923); accord Young v. City of Duluth, 386 N.W.2d 732 (Minn. 1986). The Respondent's claim that the Petitioners' positions were abolished in good faith is an affirmative defense for which the Respondent has the burden of proof. Minn. Rules pt. 1400.7300, subp. 5; Martensen v. Minneapolis Board of Education, OAH Docket No. 55-3100-8473-2 (April 13, 1994) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated June 30, 1994); Oleson v. Benton County, OAH Docket No. 69-3100-5670-2 (Aug. 26, 1991) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated Oct. 1, 1991); Obedoza v. Metropolitan Transit Commission, OAH Docket No. 4-3100-5640-2 (March 4, 1992) (adopted by Commissioner of Veterans Affairs in a Decision and Order dated Oct. 23, 1991), aff'd (without discussion of burden of proof), 1992 W.L. 350279 (Minn. App. 1992).

The absence of good faith may be proven by showing that the public employer, under the guise of abolishing a veteran's position, actually continued the position under another name or reassigned the veteran's duties to a less senior employee. Young, 386 N.W.2d at 738-39. The Supreme Court stated in Young:

If the city merely reassigned Young's duties to non-veteran employees less senior than he, his position is not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans Preference Act is applicable in cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the act exists for such situations. Thus, veterans have a preference over non-veteran employees less senior than they to continue to

perform duties for which they are qualified if the public employer continues to need such duties performed.

386 N.W.2d at 738-39 (footnote omitted). In Gorecki v. Ramsey County, 437 N.W.2d 646, 650 (Minn. 1989), the Supreme Court indicated that two principles should guide the examination of the employer's conduct:

The first is that the Veterans Preference Act itself was designed to "take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause." Young v. City of Duluth, 386 N.W.2d 732, 737 (Minn. 1986) (quoting State ex rel. Boyd v. Matson, 155 Minn. 137, 151-52, 193 N.W. 30, 32 (1923)). See also Johnson v. Village of Cohasset, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962) (VPA protects honorably discharged veterans from the ravages of a political spoils system). While the impact of political decisions upon a veteran's employment are minimized, the act cannot be viewed as fully restricting the government's exercise or control over its administrative affairs. See State ex rel. Boyd v. Matson, 155 Minn. 137, 193 N.W. 30 (1923). A ministerial or perfunctory act of coordinating an actual position with its appropriate classification will withstand scrutiny if based upon a reasonable exercise of administrative discretion. The second principle is one requiring this court to examine the substance of the administrative decision rather than its mere form. See Myers v. City of Oakdale, 409 N.W.2d 848 (Minn. 1987).

In this case, the Board legitimately made a determination that there was a need to reduce the budget for 1995 by \$250,000 and that it was necessary to do so through the reduction of several positions. Based upon all of the circumstances, however, the County has not shown that the decision to abolish the Personnel Coordinator and Risk Manager positions was made in good faith. The Administrative Law Judge concludes that these acts were directed at the Petitioners personally, rather than directed at the positions they held.^[11] This conclusion is reached for several reasons.

First, both Koep and Wagner were political allies of former County Attorney Jack Graham and had disagreed with Stier's recommendations and actions in connection with charges of sexual harassment filed against Graham. Stier recommended that the charging party file charges with the Department of Human Rights, and also recommended that the charging party be transferred to a different department. The Board rejected his suggestion. Both Koep and Wagner stated that they did not believe that any of the women's charges were true. Graham became angry when Stier and Jacobs gave statements to the charging party's attorney without first consulting with the Board or its attorney. Both Wagner and Koep felt that Stier had acted inappropriately. Graham requested that Stier be dismissed, but the Board did not take action. Subsequently, in

June 1994, Graham sued Stier in District Court. That action was later dismissed on summary judgment in November 1994. During the last week of December 1994, Graham brought Stier before a grand jury and sought an indictment against him for destroying secret personnel files. The grand jury refused to indict him. Shortly thereafter, the Board, led by Wagner and Koep, voted 4-1 to eliminate the Personnel Coordinator and Risk Manager positions.

Although Graham, Wagner and Koep were particularly upset with Stier, who was perceived as a ringleader, the Judge is persuaded that Jacobs was perceived as Stier's affiliate and that they felt Jacobs's employment should also be terminated for reasons other than bona fide budgetary considerations.

Second, it appears that there was not a strong budgetary reason to eliminate Jacobs's position. Although a figure cannot be established with certainty based on this record, it appears that the County would have enjoyed a premium savings of approximately \$30,000 if it had retained a risk manager. The total 1995 budget for Jacobs's risk management function was only \$78,123.

Third, Koep and Wagner also had non-budgetary reasons in mind when they removed Stier and Jacobs. Koep testified that Stier's position was targeted by her for elimination at least in part because she was disappointed in Stier's failure to take over labor negotiation responsibilities. Wagner testified that the Personnel Coordinator position would not have been eliminated if Stier had performed his job well. Because these statements appear to reflect concerns about the performance of Jacobs and Stier, the assertions of Wagner and Koep that the positions were abolished purely for budgetary reasons are undermined.

Fourth, Sarah Carlson, Stier's and Jacobs's administrative assistant, testified that, on January 6, 1995, Wagner told her that he was sorry about abolishing her job but that something had to be done about Stier and Jacobs. Wagner told Carlson that he might be able to create a new position for her but it couldn't be in the personnel area because that had been eliminated and if she was given a personnel position it would appear that Stier had been fired. He told her that someone would be needed to do the paperwork. Carlson provided detailed and credible testimony regarding this conversation. She supported her testimony by reading from her journal. She has no apparent reason to fabricate this testimony. In fact, since she is currently employed by the County in another position, she may be placing herself at risk by providing testimony placing a current Board member in a less than favorable light. Accordingly, the Judge credits Carlson's testimony regarding the conversation and does not find Wagner's denial of the conversation to be credible.

Finally, Wagner's obsession with the files -- which was clearly related to the charges against Graham -- and the manner in which Stier and Jacobs were removed from their positions constitutes further evidence of the County's animosity. After the Board resolved to immediately secure the offices of the Personnel Coordinator and Risk Manager on January 31, 1995, Wagner talked to then-County Attorney Ryan about securing the files by changing the locks. Ryan did not direct Wagner to change the locks that day, but felt that there was merit to having Stier and Jacobs stop working before the effective date of their discharge on February 3, 1995, so that the files could be secured. Later that day,

the locks on the door to Stier's and Jacobs's offices were changed without notice to them. The next day, a custodian let Stier and Carlson into their offices. A few minutes later, Wagner stormed in. He was upset and told them that the auditor and the county attorney were now responsible for the records and that they should get their things together and go home. There was an angry confrontation during which Wagner attempted to prevent Stier from calling Jacobs and in fact prevented Jacobs from calling the MCIT. Even though Graham was no longer the County Attorney, he and a newspaper reporter were present with Wagner.^[12] For all these reasons, the Administrative Law Judge concludes that the Respondent has not borne its burden of demonstrating that the Personnel Coordinator and Risk Manager positions were abolished in good faith.

In enacting the Veterans Preference Act, "[t]he legislature . . . clearly manifested its intent that veterans enjoy security in public employment, protected from 'the ravages and insecurity of a political spoils system.'" AFSCME Council 96 v. Arrowhead Regional Corrections Board, 356 N.W.2d 295, 298 (Minn. 1984), quoting Johnson v. Village of Cohasset, 263 Minn. 425, 435, 116 N.W.2d 692, 699 (1962). The Petitioners were not department heads or employees serving in a strictly confidential relationship to an appointing authority. In addition, they were not terminated as a result of a good faith abolishment of their positions. Reinstatement and back pay are, therefore, appropriate.

J.L.L.

^[1] The County hired from 50 to 100 employees annually. Most of these hirings were for temporary or seasonal work.

^[2] The plan was required by the Minnesota Pay Equity Act (MPEA), Minn. Stat. §§ 471.991-471.999. The Act is designed to eliminate sex-based disparities in the compensation paid to municipal employees. In particular, it addresses sex-based wage disparities between members of male-dominated versus female-dominated classes. Armstrong v. Civil Service Commission, 498 N.W.2d 471, 476 (Minn. Ct. App. 1993), rev. den. May 28, 1993.

^[3] Although Jacobs's Risk Manager position placed him in the personnel division under Stier's supervision, Stier never supervised Jacobs in the day-to-day performance of Jacobs's duties. Jacobs operated independently and reported directly to the County Board.

^[4] The County Attorney and committees composed of commissioners and department heads have been performing many of Stier's job duties since his departure. There is no evidence that they have received specialized training in the personnel field.

^[5] It is evident that the County at times included Stier and Jacobs in meetings or on lists of department heads and at times did not. Stier and Jacobs also responded on one occasion to a letter from a new Commissioner seeking information from "department heads." In any case, however, a determination that someone is a department head within the meaning of the Act "requires more than [the political subdivision's] designation of [the petitioner] as the head of a portion of the county's offices." Holmes, 402 N.W.2d at 646.

^[6] Since Jacobs's departure, the County Attorney has become the contact person for the MCIT. There is no evidence that he has any specialized training or experience in the area of risk management.

^[7] The Judge ultimately concluded in Possin that a human resource specialist who worked under the general supervision of an assistant human resource director and had no supervisory, managerial or confidential advisory responsibilities did not have a strictly confidential relation to the school board, the human resource director, or the supervising assistant human resource director.

^[8] Even appointed department heads are to be removed from office “on terms and procedures as far as possible in conformity with the terms and procedures prescribed in these policies for the imposition of discipline or discharge, but in any event in conformity with applicable statutes and regulations of the State of Minnesota.” Ex. 43, § 22.04.

^[9] There is no information in the record regarding the frequency of closed meetings in prior years.

^[10] In its post-hearing brief, the County focused only on Jacobs’s Risk Manager duties and did not assert that Jacobs had a strictly confidential relationship with the Board with respect to his Maintenance Manager duties.

^[11] The evidence at the hearing focused upon Commissioners Wagner and Koep, who were supporters of former County Attorney Jack Graham. The Board voted 4-1 to eliminate the positions of Stier and Jacobs. Wagner brought the motion to eliminate their positions; Koep seconded the motion. Because the Administrative Law Judge has found that Wagner and Koep acted in bad faith with respect to the elimination of Stier’s and Jacobs’s positions, their votes should not be counted. The matter could not have carried with a vote of 2-1 since at least 3 votes are required for passage. Minn. Stat. § 357.07 (1994). Therefore, the motivations of the other Board members who voted in favor of the elimination of the positions need not be examined.

^[12] Even assuming, arguendo, that Wagner and Koep were motivated in part by legitimate budgetary reasons in eliminating the positions of Stier and Jacobs, the Administrative Law Judge concludes based upon all of the circumstances that the Petitioners are entitled to prevail in this case. As noted above, it is evident that Wagner and Koep were also motivated at least in part by their displeasure that Stier and Jacobs had supported the charging party rather than Graham. It is appropriate to look to “mixed motive” cases arising under the Minnesota Human Rights Act for guidance regarding the proper analysis under the Veterans Preference Act. In such cases, the plaintiff is required to persuade the fact-finder that discrimination was a “discernible, discriminatory, and causative factor” in the decision. Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989). Thus, when “a substantial causative factor entering into the decision to discharge an employee” is based upon an impermissible factor, the Minnesota Human Rights Act affords an employee remedies against the employer. Because the veterans have shown that retaliation against them for supporting the charging party was a discernible and substantial causative factor in the decision of Wagner and Koep to eliminate their positions, they have proven their case even under a mixed motive analysis.